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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-448

DELTA AIR LINES, INC., ET AL., *Petitioners*,

v.

CIVIL AERONAUTICS BOARD, *Respondent*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Petitioner, National Airlines, Inc. ("National"), requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals, which has not yet been officially reported, appears at Appendix A hereto. Therein the Court remanded for further limited proceedings, without vacating, Board Orders 76-3-93 (March 15, 1976) and 76-6-120 (June 16, 1976) granting the application of Western Air Lines, Inc. ("Western") for Miami-Los Angeles nonstop license authority and denying competing applications, including that of Pan American World Airways ("Pan American"). The Board's Orders appear at Appendices B and C. Subsequent orders of the Court of Ap-

peals amending the Court's June 23 opinion and judgment, denying National's petition for rehearing and suggestion for rehearing en banc, and denying National's petition for stay of mandate, all entered August 2, 1977, appear at Appendices D, E, F, G, and H, respectively.

JURISDICTION

The judgment of the Court of Appeals, which was entered on June 23, 1977, appears at Appendix I. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

At the urging of National, the incumbent carrier on the Miami-Los Angeles route, and Pan American, a disappointed route applicant, the Court of Appeals found that the Civil Aeronautics Board's issuance of a Miami-Los Angeles non-stop license to Western was tainted by substantial procedural shortcomings. Specifically, the Court of Appeals rejected the Board's efforts to update selectively the stale record before it without any opportunity for adversarial exploration of the post-record considerations upon which the Board's licensing decision was premised.

Despite this finding, the Court of Appeals refused to set aside Western's license and attempted to limit remand proceedings to "adversarial exploration" of the "recent developments considered by the Board in reaching its decision to prefer Western over Pan American." Appendix A at 42. The Court's mandate may thus preclude the Board from reexamining, under proper procedures, the issue whether the public convenience and necessity requires additional Miami-Los

Angeles service, from reconsidering the applications of carriers other than Western and Pan American,* or even from considering the full range of relevant decisional factors which might distinguish Western from Pan American. Apparently, this unique mandate was shaped by the Court of Appeals' own conclusion that additional service was warranted on the route and that the Board proceedings were already too protracted.

Regardless of the substantive merit of the Court of Appeal's position, its refusal to set aside Western's tainted license and its efforts to curtail the Board's public interest mandate on remand, in derogation of this Court's decisions, raise two critical issues:

1. Whether the Court of Appeals Can Refuse to Set Aside A Procedurally Defective CAB Decision Solely Because the Result Is Acceptable to the Court?

2. Whether the Court of Appeals, By a Formal Retention of Jurisdiction, Can Attempt to Narrow the Scope of the Civil Aeronautics Board's Public Interest Discretion on Remand?

STATUTES AND REGULATIONS INVOLVED

Pertinent provisions of the Federal Aviation Act, 49 U.S.C. § 1301 *et seq.* and the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.*, appear at Appendix J.

STATEMENT OF THE CASE

A. The Proceedings Leading to Western's Certification by the Board

In 1972, the Board initiated a proceeding to consider whether the public convenience and necessity required

* American Airlines, Continental Air Lines, Delta Air Lines, and Northwest Airlines were also applicants.

nonstop service between Miami and Los Angeles in addition to that provided by National and, if so, which carrier should provide it. Order 72-8-95 (August 23, 1972).* By June, 1973, an Administrative Law Judge rendered an initial decision proposing to license Pan American to provide service in competition with National.

Shortly after the June 1973 initial decision, the Board indicated its intention to review. Final argument, however, was not heard until early 1975 to permit, *inter alia*, consideration of environmental impact. The Board's decision ultimately supported the Law Judge's conclusion that additional service was required but selected Western rather than Pan American to provide it. That decision did not issue until March 13, 1976.

B. Significant Interim Developments

The record upon which the Board acted was closed at the termination of hearings before the Administrative Law Judge in early 1973. That record projected 1974 operations under various licensing proposals using available 1971 data. The Law Judge's conclusions were based squarely on these 1974 projections which persuaded him that market growth and relatively low "break-even" load factors would permit mutually profitable competitive services in 1974.

* In 1969, as part of a wide-ranging route proceeding, the Board had certificated Northeast Airlines ("Northeast") to provide competitive nonstop service on the Miami-Los Angeles route in competition with National. *Southern Tier Competitive Nonstop Investigation*, Order 69-7-135 (July 24, 1969). Northeast's weakened financial condition precipitated its merger into Delta Air Lines ("Delta"), at which time the Board suspended its Miami-Los Angeles authority. The present proceedings were initiated one month after the suspension of Northeast's authority.

When the Board acted, officially noticeable 1974 traffic data demonstrated that the Law Judge had been excessively optimistic. Thus, while the judge had predicted that the market would grow to 261,000 passengers in 1974, actual traffic reflected by the Board's statistics was only 227,350, a rate of market growth closer to three rather than the predicted eleven per cent. This shortfall reflected the debilitating effect of the combined forces of inflation and recession on the market even without the diversionary effects of new Board initiatives in the nonstop charter area.*

Significant post-hearing events also undercut the record concerning the potential profitability of competitive operations. The most obvious change was the unprecedented increase in jet fuel costs, 200% on the average, between hearing and decision. Inflationary increases, far in excess of any anticipated by the parties, also occurred in all other areas of carrier costs. While there had been some compensatory increases in per passenger revenue yields, these increases were not

* Thus, in 1975, the Board authorized new One-Stop-Inclusive Tour Charters ("OTC's"), 14 C.F.R. Part 378a, which permitted the marketing of transportation and accommodation packages to the public at large with minimal restrictions, and in 1976 authorized Advance Booking Charters ("ABC's"), CAB Regulation SPR-110, 41 Fed. Reg. 37763 (1976), which for the first time made air charter travel (without related ground arrangements) available to the public. Substantial scheduled and supplemental carriers, such as United Airlines and World Airways, had begun to offer GTC packages in the Miami-Los Angeles market and are also likely to offer ABC service. These new alternatives to scheduled nonstop service are obviously likely to prove attractive to the 65 percent discretionary travel segment of the Miami-Los Angeles market but the record was closed before any evidence could be presented on their impact on scheduled traffic growth and the market stimulation likely from new services.

proportional with the cost increases on the Miami-Los Angeles route. Thus, the record provided no foundation for assessing "break-even" load factors or the particular profitability of any post-1974 operations even on the basis of known or agreed traffic flows.

Attempts by several of the parties to reopen the record on the basis of these developments were rejected by the Board. Continental Air Lines moved to secure reopening in the fall of 1974; National made a similar motion in January, 1976; and Pan American filed a motion to reopen in March of 1976. The Board deferred ruling on all three motions until its decision on the merits.

C. The Board's Decision

In reaching its decision to certificate Western, the Board abandoned the traffic and revenue projections made by the Administrative Law Judge, which it conceded were "largely outstripped by the passage of time and changed circumstances," Appendix B at 17, and constructed a new set of traffic projections for a new forecast year, 1977. Growth and market stimulation factors, as well as the percentage of the market likely to utilize scheduled nonstop service, were determined without further input from the parties with the resulting traffic forecast arising from a mixture of some record data, certain officially noticeable post-hearing traffic data for 1974, and other extra-record factors and theories selected by the Board.

As to the profitability of the route in 1977, the Board had no actual route cost data for years subsequent to 1971 and no projections from the parties for any year

after 1974. Accordingly, the Board reached a conclusion of mutual profitability in 1977 by comparing its own predicted load factors in 1977 with the break-even load factors forecast by the parties in 1973.*

Turning to its reversal of the Law Judge's selection of Pan American, the Board once again relied on its own projection of 1977 circumstances to determine that "Western will be able to provide more significant [beyond-segment passenger traffic] benefits than any other applicant." Appendix B at 29.** In so doing, the Board unilaterally attempted to assess Western's 1977 traffic as well as the consequences of certain post-record changes in Pan American's route structure and operating patterns. *Id.* at 25-42.

Promptly after the Board's decision in this matter, National, Pan American and several other parties submitted petitions for reconsideration and rehearing to the Board. In its petition, National pointed to specific areas in which, on rehearing, it would adduce evidence demonstrating that the 1977 Miami-Los Angeles market could not support profitable operations by two carriers. All of these requests were rejected by the Board.

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* The narrow profit margin anticipated by the Board on the basis of this inadequate data is suggested by its rejection of the dissenting members' proposal that Pan American be certificated to provide one flight per day on a test basis. The majority of the Board concluded that five flights per day, rather than the four to be provided by Western and National, would push load factors to dangerously low levels. In sum, even on the basis of lower record cost data, the Board thought the profitability of competitive service was a close question.

** A beyond-segment passenger is one who utilizes Miami-Los Angeles service for a trip which begins and/or ends past Miami or Los Angeles.

D. The Decision Below

Several parties to the Board proceedings sought review of Western's license under 49 U.S.C. § 1486. In its June 23, 1977 opinion, the Court of Appeals found the Board to have erred both in the selective manner in which it updated the record and in its unexplained departures from prior carrier selection policy guidelines.

More specifically, the Court found the Board's manipulation of the record to have violated the basic principle enunciated in prior CAB review that "when an agency chooses to update an administrative record, it must proceed in a manner fair to all concerned." Appendix A at 42. However, despite the fact that the Board's selective updating focused primarily on the issue of the need for competition, the Court addressed only those aspects of the updating which pertained to the carrier selection issue and, more particularly, to the choice between Pan American and Western.

Thus, the Court was particularly critical of the Board's unquestioning acceptance of the Administrative Law Judge's generous projections for Western's beyond-segment traffic in view of its rejection, on the basis of current data, of the greater beyond-segment traffic which the Administrative Law Judge estimated Pan American would carry. The Court did not consider the impact of the Board's irregularities on the more basic issue of the forecast of market size, however, and the only reference made to National's arguments was a footnote stating, "We do not believe . . . that National was injured in any way by the Board's refusal to permit participation by the parties" and that "National has not drawn our attention to any factors which indicate that procedural shortcomings caused the Board to ignore evidence suggesting a contrary outcome on the need for competition issue." *Id.* at 29, n.15.*

Considering the need to correct the errors of law it had detected, the Court of Appeals held that "where the Board's seemingly inconsistent policy posture is combined with Pan American's credible attacks on the Board's selective updating technique, we are convinced that supplementation of the record is necessary to assure fairness to the competing applicants." *Id.* at 40. By analogy to its previous decision in *Delta Air Lines, Inc. v. CAB*, 442 F.2d 730 (1970), the Court pointed out that "where the delay is long, the case close, and the intervening events significant, participation by interested parties may well be indispensable." *Id.* at 42.

In contrast with the broad statement of its holding, however, the Court appeared to limit proceedings on remand of the case to a hearing on "the recent developments considered by the Board in reaching its decision to prefer Western over Pan American" and limited the Board to "reexamin[ing] *that* decision in light of the record so produced." *Id.* at 42 (emphasis added). In addition, notwithstanding the Board's errors of law, the Court summarily decided that "the Board's 1976 orders will not be vacated, and service by Western on

* Similarly, while the Court was critical of the Board's unexplained departure from prior policies, it discussed in its opinion only the instance of such conduct which involved Pan American, i.e., the Board's failure to explain why beyond-segment traffic was critical to this licensing decision when it had declared, in an earlier phase of the proceeding in 1969, that such traffic was of little consequence in transcontinental route determinations. The more serious instance of Board inconsistency, in criticizing National for failing to provide excess capacity which would have violated the Board's 55 percent load factor standard announced in the *Domestic Passenger Fare Investigation*, Orders 71-4-54 (April 9, 1971) and 71-4-58 (April 6, 1971), was never addressed by the Court.

the Miami-Los Angeles route will not be suspended." *Id.*

National petitioned the Court for rehearing on July 7, 1977. National vigorously protested the Court's determination that National had not been injured by the Board's procedural shortcomings and contended that the Court's disposition of the case was inconsistent with its holding and threatened to prejudice the Board's ability to exercise its permanent and interim licensing discretion. On August 2, 1977, the Court entered separate orders rejecting National's petition for rehearing and amending, *sua sponte*, the June 23 opinion and judgment by changing the phrase "remand the case" to "remand the record" wherever it appeared in the opinion and judgment.* Under the rules of the United States Court of Appeals for the District of Columbia Circuit, the latter language retains jurisdiction in the Court pending completion of the remanded proceeding before the agency. Rule 13(d), Rules of U.S. Court of Appeals for D.C. Circuit.

REASONS FOR GRANTING THE WRIT

Plenary review of the Court of Appeals' decision by this Court is necessary to avoid the development of a

* At the same time it filed its petition for rehearing, National also filed a suggestion for rehearing en banc and a petition for stay of mandate pending disposition thereof, both of which were denied on August 2, 1977. The Court of Appeals' attitude toward National was clearly reflected in its Stay Order, which stated:

> "The Court is of the view that in all probability denial of a stay will not harm National since the Court's order, even if not stayed, does not remove Western's operating authority during the pendency of the remand proceeding, and thus National will not, by the denial of the stay, recapture the monopoly position it enjoyed prior to the issuance of the Board's order." Appendix H at 1.

pernicious doctrine of administrative review which would permit courts of appeals to ignore procedural defects in agency actions whenever the agency result was satisfactory to the reviewing court. Moreover, this Court must act to reform the abberational mandate of the Court of Appeals which utilizes formal retention of jurisdiction as a ploy to limit the bounds of agency remand discretion contrary to a line of this Court's decisions commencing with *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134 (1940).

I. This Court Should Grant Certiorari To Preclude Courts of Appeals From Sustaining Procedurally Defective Agency Decisions Because Their Substantive Results Are Acceptable To the Courts of Appeals.

As clearly set forth in Section 10 of the Administrative Procedure Act, a "reviewing court shall . . . (2) hold unlawful and set aside agency action, findings and conclusions found to be . . . (D) without observance of procedure required by law." 5 U.S.C. § 706(2)(D). That rule heretofore consistently has been followed in review of Civil Aeronautics Board licensing proceedings by courts of appeals which have simply set aside the Board order and remanded defective licensing cases for further proceedings by the Board. *See, e.g., Northwest Airlines, Inc. v. CAB*, 539 F.2d 748 (D.C. Cir. 1976); *Continental Air Lines, Inc. v. CAB*, 519 F.2d 944 (D.C. Cir. 1975); *Continental Air Lines, Inc. v.* CAB, 443 F.2d 745 (D.C. Cir. 1971); *Kodiak Airways, Inc. v. CAB*, 447 F.2d 341 (D.C. Cir. 1971); *Braniff Airways, Inc. v. CAB*, 306 F.2d 739 (D.C. Cir. 1962). Indeed, the Court of Appeals for the District of Columbia Circuit has itself stated that when it "cannot escape the conclusion" that the agency erred in reaching its decision, the erroneous order "must be set aside."

Williams v. Washington Metropolitan Transit Comm'n, 415 F.2d 922, 939 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1081 (1969).

In this case, the Court of Appeals was compelled to recognize that the Board's selective, non-adversarial updating of the record was a substantial procedural shortcoming. It was also inescapable that the selective updating technique was applied by the Board both in determining whether any additional Miami-Los Angeles service was required and in selecting Western over Pan American.* Moreover, National had raised the selective updating issue before the Board and had requested reopening of the record so that it could adversarially address significant post-record developments bearing on the profitability of competitive service.**

Nevertheless, the Court of Appeals attempted to brush aside National's arguments because, in its view, National was not "injured in any way" by the Board's procedural shortcomings. Per the Court: "National has not drawn our attention to any factors which indicate that procedural shortcomings caused the Board to ignore evidence suggesting a contrary outcome on

* Thus, National had shown that the Board, in concluding that additional service was needed, had used selected post-hearing data without giving the parties a chance to controvert or supplement that data (for example, the Board's independent analysis of post-record traffic trends and national economic developments in support of its traffic growth projections) and had ignored post-hearing data inconsistent with its decision (for example, the Board's refusal to consider the dramatic post-record increases in carrier costs in connection with its assessment of the profitability of additional service). Brief of Petitioner National Airlines, Inc., August 12, 1976, at 31-44.

** See Petition of National Airlines, Inc. for Reconsideration, Reopening, Rehearing and Reargument, April 5, 1976.

the need for competition issue." Appendix A at 29, n.15.

The Court below gave no indication how it determined that the Board would not have been influenced by the evidence which National had been precluded from presenting to the Board. Indeed, the Court's own statement demonstrates that National simply had *failed to persuade the Court* that a different substantive conclusion on competitive service needs was appropriate.

Not only was National unaware that it was obligated to argue the substantive issue to the Court, but the Court's intrusion into the area of substantive Civil Aeronautics Board discretion was inconsistent with its own precedents as well as the limited discretionary role prescribed for reviewing courts in *SEC v. Chenery Corp.*, 332 U.S. 194 (1947). In *Braniff Airways, Inc. v. CAB*, 379 F.2d. 453, 465-66 (D.C. Cir. 1967), the District of Columbia Circuit recognized that the question "whether the agency would have reached the same result if it had not made . . . erroneous findings" was a "type of issue on which we think it is appropriate to insist on further guidance from the agency."

Unless the decision below is reviewed and reversed by this Court, the District of Columbia Circuit will have breached the "vital differentiations between the functions of judicial and administrative tribunals" in a particularly egregious way. *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 144 (1940). Courts of appeals will have assumed the discretionary authority to pass on the merits of the position of any party challenging procedural defects in agency proceedings on the thesis that a party cannot be "injured"

unless, *in the court's view*, it should prevail on the merits.

In a recent reversal of a District of Columbia Circuit decision, this Court instructed that: "If the decision of the agency 'is not sustainable on the administrative record made, then the . . . decision must be vacated and the matter remanded . . . for further consideration.' " *FPC v. Transcontinental Gas Pipe Line Corp.*, 423 U.S. 326, 331 (1976) (per curiam) citing *Camp v. Pitts*, 411 U.S. 138, 142 (1973)). The District of Columbia Circuit has ignored that admonition by refusing to vacate Western's license premised on an improperly updated record simply because it disagrees with National's substantive position. Certiorari is urgently required to overturn this most troublesome precedent.

II. Review By This Court Is Also Required To Preclude the Use of Formal Retention of Jurisdiction As A Device For Unwarranted Limitation on the Discretion of Administrative Agencies.

Because the Court below was obviously more sympathetic to the substantive position of Pan American than National, it absolved the Board of its procedural irregularities on the need for competition issue and only remanded "the record for adversarial exploration of the recent developments considered by the Board in reaching its decision to prefer Western over Pan American." Appendix A at 42.*

By this limited mandate, the Court of Appeals effectively certificated Western to provide interim ser-

* The word "case" was changed to "record" by the Court's Order of August 2, 1977. Appendix D.

vice on the Miami-Los Angeles route pending further Board decision, effectively precluded the Board from reconsidering the competitive need issue in light of post-record developments.* and effectively prevented the Board from choosing any other applicant beside Western or Pan American regardless of overall public interest considerations. Each of these actions unduly infringed the Board's public interest responsibilities as spelled out in this Court's decisions limiting judicial control of agency remand proceedings. The Court of Appeals' effort to justify these limitations by retaining jurisdiction of the appeal distorts the concept of retained jurisdiction and would render it a vehicle for a significant shift of agency discretion to the courts of appeals.

First, Sections 401(d)(2) and 416 of the Federal Aviation Act, 49 U.S.C. §§ 1371(d)(2), and 1386, confer on the Board exclusive interim licensing authority adequate to meet any public need for interim service. Prior to this case, the Court of Appeals had consistently deferred to that authority. *See, e.g., Air Line Pilots Ass'n, Int'l v. CAB*, 458 F.2d 846 (D.C. Cir. 1972); *Continental Air Lines, Inc. v. CAB*, 443 F.2d 745 (D.C. Cir. 1971); *Kodiak Airways, Inc. v. CAB*, 447 F.2d 341 (D.C. Cir. 1971); *Braniff Airways, Inc. v. CAB*, 306 F.2d 739 (D.C. Cir. 1962). In fact, the Court below had recognized such interim service

* The Board might well wish to weigh the competitive need issue in light of Western's actual Miami-Los Angeles experience which has been a substantial and continuing loss record (*see* Aviation Daily, June 7, 1977, p. 206), coupled with actual market load factors well below the Board's predicted 40-45 percent range for 1977 (data at Appendix B to National's Petition for Rehearing and Suggestion for Rehearing En Banc).

as a matter properly within the Board's discretion even where the order under review was not set aside. *Air Line Pilots Ass'n, Int'l v. CAB, supra.*

Second, the question of need for competitive service is undoubtedly one which the Board must resolve on the basis of public interest considerations. The Court's attempt to preclude further review of this issue by the Board in this licensing proceeding is contrary to this Court's opinion in *FPC v. Transcontinental Gas Pipe Line Corp.*, 423 U.S. 326 (1975). In *Transcontinental Gas*, the Court of Appeals found FPC findings insufficient to support a curtailment order and sought to require the FPC to compile further evidence for submission to the Court of Appeals. This Court vacated the Court of Appeals' order because it usurped the FPC's authority "to decide how to develop the needed evidence and how its prior decision should be modified in light of such evidence. . . ." 423 U.S. at 123. *See also FPC v. Idaho Power Co.*, 344 U.S. 17 (1952) (where court struck improper license condition, it could not order issuance of license without further administrative proceeding).

Third, the Court of Appeals' attempt to limit the Board's carrier selection choice to Western or Pan American flatly contradicts the teaching of *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134 (1940). In *Pottsville*, this Court held that a reviewing court could not prevent the Federal Communications Commission from consolidating a remanded licensing application with all other pending applications even though two of the consolidated applications were filed after the erroneous denial of the remanded application. 309 U.S. at 145. Similarly, the Court of Appeals should not have attempted to preclude the Board from considering

all applicants for Miami-Los Angeles route authority on remand.*

The Court of Appeals' belated modification of the language of its remand to effect a retention of judicial jurisdiction cannot be used to justify these improper limits on Board discretion. While a court of appeals may, in certain circumstances, choose to remand a case or record without setting aside the agency's decision, *see, e.g., Ford Motor Co. v. NLRB*, 305 U.S. 364 (1939), this power has been described as one which enables the court "to perform its task of providing 'meaningful judicial review. . . .'" *American Public Gas Ass'n v. FPC*, No. 76-2000, *et al.*, (D.C. Cir., June 16, 1977), Slip Op. at 26, n.14. Accordingly, its use previously has been confined to instances in which the agency record was insufficient to permit review of the agency decision, *see. e.g., Air Line Pilots Ass'n, Int'l v. CAB*, 458 F.2d 846 (D.C. Cir. 1972), where further proceedings were necessary to aid the court in reviewing complex technical issues, *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375 (D.C. Cir. 1973), *cert. denied* 417 U.S. 921 (1974) or where it appeared the agency should be permitted to consider developments occurring subsequent to its order, *see, e.g., Fleming v. FCC*, 225 F.2d 523 (D.C. Cir. 1955).

In sum, the Court of Appeals' attempt to bring the case to a rapid conclusion by limiting the scope of remand proceedings was clearly erroneous. Review by this Court is essential to vindicate this Court's

* Indeed, the Court below went further than the offending court in *Pottsville* by apparently limiting the factors to be considered in the Pan American/Western choice to those "recent developments" previously considered by the Board. Clearly, the Board should not be estopped from a comprehensive reconsideration of all selection factors.

earlier precedents and to prevent a formal retention of jurisdiction from becoming a vehicle for a massive shift of power between court and agency.

CONCLUSION

The manner in which the Court of Appeals disposed of the petitions for review of the Board's orders in this case raises a new threat to the proper scope of judicial vis-a-vis agency authority established by this Court in *Pottsville* and a long line of subsequent cases. In view of the seriousness of the Court of Appeals' intrusion into protected areas of agency discretion and the use of a new procedural guise, retention of jurisdiction and remand of the record, to justify this intrusion, this Court should grant certiorari and set this case for plenary hearing.

Respectfully submitted,

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